Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Carriage of the Transmissions of Digital Television Broadcast Stations	)	
	)	CS Docket No. 98-120
Amendments to Part 76 of the Commission's Rules	)	
	)	
To: The Commission	)	

REPLY COMMENTS OF LINCOLN BROADCASTING COMPANY

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REPLY COMMENTS OF LINCOLN BROADCASTING COMPANY

1. Lincoln Broadcasting Company ("Lincoln"),[1] licensee of local commercial television broadcast station KTSF(TV), San Francisco, California, submits these Reply Comments to respond to and refute the October 13, 1998 joint opening comments ("Comments") of International Cable Channels Partnership, Ltd., d/b/a The International Channel, and other parties (hereinafter collectively "Commenters").[2]

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[1] The full name of the licensee is Lincoln Broadcasting Company, A California Limited Partnership.

[2] The International Channel is the lead party to the Comments, and "distributes" the channels of the other joint Commenters to cable operators under the brand name "International Premium Networks." International Channel, *What's On* (visited Dec. 15, 1998) <http://www.i-channel.com/whatson/ipns/index.html>. Other Commenters include TV5 USA, Inc. d/b/a TV5, Asia Star Broadcasting, Inc. d/b/a TV Asia, Radiotelevisione Italiana d/b/a RAI International, ABS-CBN International, Inc. d/b/a The Filipino Channel, and Arab Radio and Television.

I. SUMMARY OF POSITION

2. In essence, the Commenters argue against application of must carry rules to digital broadcast signals on the misplaced, hyperbolic ground that to do so would "sever the links many millions of Americans have with their ethnic communities" and "destroy the benefits of the Commission's years of support for programming diversity."[3/] In fact, must carry ensures that multiple, diverse minority communities can receive KTSF's rich diversity of local and other broadcast programming in their languages. Must carry will continue to be essential to ensure cable carriage of KTSF's DTV signal, particularly in light of the competitive imbalance with respect to carriage that is created by the International Channel's ownership by TCI, the nation's second largest cable operator.

II. THE APPROACH ADVOCATED BY COMMENTERS WOULD BLOCK THE GOALS OF THIS PROCEEDING

3. Factually and analytically, the Comments are fundamentally flawed. Their approach -- to abandon must carry protection for local broadcast stations just as they undertake the major investment in DTV conversion -- would undermine all of the policy objectives of this proceeding, and restore to cable operators and their affiliated program channels the gatekeeper power to exclude broadcast DTV competition from the marketplace.

4. The goals of this proceeding are set out by statute, by the Supreme Court and by the Commission, and it is useful to view the Comments in light of them all. This proceeding is required by Section 614(b)(4)(B) of the Communications Act in order "to establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of . . . broadcast signals of local commercial television stations" which make the changes

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[3/] Comments at 3.

necessary to conform to new digital television (DTV) standards.[4] In upholding Section 614 just last year, the Supreme Court "emphasized that preserving the benefits of free, over-the-air broadcast television, promoting the widespread dissemination of information from a multiplicity of sources, and promoting fair competition in the market for television programming, were important governmental interests."[5] In the Notice the Commission cites the statutory goals of successful introduction of digital broadcast television and recovery of the vacated broadcast spectrum; minimization of the disruption and cost to subscribers, cable operators and programmers, while not inhibiting investment and innovation in technologies and services; and an efficient, orderly transition to DTV "that implements the law in a manner that, to the extent possible, permits market forces and private agreements to resolve issues . . . ".[6]

5. For the multiple reasons set forth below, application of must carry to KTSF broadcasts during and after the transition to DTV advances, and is necessary to, these goals, which would be thwarted by the approach of the Comments.

A. <u>KTSF Is A Local Over-the-Air Broadcaster Providing Diverse Programming to Multiple Ethnic Communities</u>

6. The Commenters presume erroneously that only they serve "non-mainstream"[7] foreign language and multicultural audiences. KTSF, in fact, has been serving those audiences

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[4] 47 U.S.C. § 534(b)(4)(B).

[5] Carriage of the Transmissions of Digital Television Broadcast Stations, *Notice of Proposed Rulemaking*, 13 FCC Rcd 15092 (1998) (hereinafter "Notice") (citing *Turner Broadcasting v. FCC*, 117 S. Ct. 1174, 1186 (1997)).

[6] *Id.* para. 1.

[7] *See* Comments at 1 and *passim*. The unsupported mischaracterization that all stations and viewers benefitting from must carry are "mainstream" is made explicitly or implicitly throughout the Comments.

continuously for the past 22 years. For the past 14 years, KTSF has qualified as a Copyright Office "specialty station" by broadcasting more than one-third of its prime-time programming, and more than one-third of its total programming, in foreign languages. Currently and for the past 14 years, one hundred percent of KTSF's prime time schedule is in non-English languages, namely the multiple Asian languages spoken by hundreds of thousands of viewers in the San Francisco Bay Area. KTSF provides programming in 14 different foreign languages, including Cantonese, Mandarin, Tagalog, Japanese, Korean, Vietnamese, and Laotian, as well as in Hindi, Farsi, Greek, Portuguese, Italian, Hebrew and Arabic, all in addition to English.

7. Lincoln therefore shares first-hand the Commenters' appreciation of the importance and public benefits of programming diversity. But removing KTSF's must carry rights as it invests in the technology and innovations of DTV is not the way to preserve that diversity. Critical distinctions between KTSF's and the Commenters' provision of programming make that clear:

- KTSF programming is available free over-the-air, as well as via cable retransmission. The Commenters' programming is available only to cable subscribers, and all of the Commenters' channels are available only to premium cable subscribers except for the International Channel.[8/] Only viewers willing and able to make the substantial cash outlay that is required month after month are eligible. Widespread cable rate increases are expected next year with the

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[8/] *See* International Channel, *What's On International Premium Networks-TFC* (visited Dec. 15, 1998) <http://www.i-channel.com/whatson/ipns/tfc.html>.

sunsetting of rate regulation.[9] Viewers who cannot afford those costs rely on broadcast programming in their languages wherever reception permits. The availability of that off-air programming in DTV format would be in serious jeopardy if must carry were eliminated just as KTSF makes the massive investment required to convert to DTV. KTSF is currently carried on virtually all cable systems in the San Francisco DMA, many of them pursuant to must carry. Given the terrain of the service area, not all viewers may rely on over-the-air reception.

- KTSF is independent of cable operator ownership or control. Lincoln is a family-owned licensee that provides its own unique voice to the community. In contrast, though not disclosed in the Comments, The International Channel is 90% owned by Liberty Media Group, a 100% subsidiary of the TCI holding company, which also owns the nation's second largest cable MSO.[10] In addition, the TCI-owned International Channel has agreements to distribute, via cable, TV5, TV Asia, RAI International, Arab Radio and Television, and the Filipino Channel.[11]

[9] *See, e.g.*, BRDCST. & CABLE, Dec. 7, 1998, at 50 ("Key members of Congress have threatened to extend the regulations if cable rates continue to outpace inflation.")

[10] In 1994, Tele-Communications Inc. ("TCI") and Liberty Media Corporation consummated a merger. As a result, TCI Group (domestic cable operations) and Liberty Media Group (programming) are both 100% subsidiaries of the same TCI holding company. *See* Tele-Communications Inc., Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 For the Fiscal Year Ended December 31, 1997 (filed March 24, 1998).

[11] *See* Comments at 7, 10; *see also* International Channel, *Homepage* (visited Dec. 15, 1998) <http://www.i-channel.com/home-index.html>.

- Lacking this vertical integration advantage that The International Channel enjoys with respect to cable carriage of its programming, KTSF is not on an equal footing now, or during or after its conversion to DTV.[12] Cable systems with financial stakes in program channels have all of the well-established anticompetitive incentives to discriminate in favor of their owned programming services with respect to whether and how to carry an unaffiliated broadcast signal.[13] Given the International Channel's ownership by TCI, it is absurd to argue, as The International Channel does, that the "marketplace" without broadcast must carry should be the sole determinant of DTV "winners and losers."[14] Also given its TCI parentage, it is not surprising that the International Channel feels secure that <u>its</u> carriage will be "easily arranged, subject only to the

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[12] Liberty Media states that "[its] strength is . . . attributable to its membership in the TCI family. For example, investments by TCI's other businesses . . . open horizons from which Liberty benefits." Liberty Media Group, *Operations Review* (visited Dec. 15, 1998) <http://www.libertymedia.com/tci.com/annualreports/tci_97sr/libgrp.html>.

[13] Documentation of these incentives, and concern about them, are legion, and are the basis for multiple statutory provisions and Commission rules including, *inter alia*, program access rules, limitations on vertical control, and leased channel access requirements. The Commission has expressly determined that integration in the cable industry has limited consumer choice. *See* Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, *Report and Order*, 8 FCC Rcd 3359 (1993); *see also* S. Rep. 102-92, at 1158-59 (1992) ("Vertical integration in the cable industry raises two concerns. First . . . vertical integration gives cable operators the incentive and ability to favor their affiliated programming services . . . Second, [these] programmers have the incentive and ability to favor cable operators over other video distribution technologies."); DAVID WATERMAN & ANDREW WEISS, VERTICAL INTEGRATION IN CABLE TELEVISION (1997). Commenters offer no support for the proposition that these concerns do not apply to DTV, and they do apply, as these Reply Comments show.

[14] Comments at 18.

normal cable operator/programmer business negotiations,"[15] once outdated cable systems increase their capacity.

- KTSF offers local programming to its foreign language and multiethnic viewers. Unlike the Commenters, KTSF has a city of license, and serves it. Continuously since 1989, for example, KTSF has produced and broadcast the nation's first daily, live television newscast in Cantonese. This program airs each weekday from 8:00-9:00 p.m. The station also produces and airs, from 7:30-8:00 p.m. each weekday, a half-hour daily newscast in Mandarin, and offers a daily newscast in Tagalog, the language spoken by many Filipinos. As a participant in the broadcast Emergency Alert System, KTSF provides emergency information in these and other foreign languages whenever possible.
- KTSF programs mainly to "non-mainstream" audiences, many of whom are not measured adequately by standard audience rating services due to language impediments. KTSF is therefore particularly vulnerable to non-carriage by operators who base discretionary carriage decisions on audience measurements alone.

B. To Ensure Availability to Viewers of Digital Broadcast Signals Such as KTSF Section 614 Must Be Applied to, Not Removed From, the Entire DTV Conversion

8. The International Channel itself has publicly recognized that "[a]s cable television operators introduce digital technology, they can offer their customers a larger number of channels."[16] This, spurred by the upgrading of existing smaller and outdated systems, and

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[15] *Id.* at 2.

[16] International Channel, *What's On*, *supra* note 2.

advancing compression techniques, is the answer to Commenters' concerns. It is not an acceptable answer to remove must carry protection from local broadcast stations as they transition to digital operation. As reflected in the International Channel quote above, cable operators are also converting to digital. Their undisputed incentives to discriminate in favor of programming they own and control apply fully to the digital context. To remove must carry protection now -- to fail to apply it to the carriage of broadcast signals during and after the DTV transition, as Commenters suggest -- would undercut all of the stated goals of this proceeding summarized at paragraph 4 above. Clearly Commenters' approach would not ensure cable carriage of local broadcast signals, as Section 614 directs. Nor would it assure the viability of free over-the-air broadcasting, or promote a multiplicity of programming sources. It is laudable that the Commenters, like KTSF, serve "niche" audiences. But it would be anathema to the goals of this proceeding to assist Commenters to become the only source for such programming; it may not be insignificant that the International Channel already describes itself as "the One Source."[17] Continued availability of independent over-the-air broadcast sources like KTSF is essential to the multiple source goal.

9. Fair competition could not be advanced by restoring unbridled gatekeeper power to the cable MSO that owns the International Channel. Successful, orderly introduction of DTV, and recovery of the broadcast spectrum, would not be promoted by slanting the playing field just at the time that broadcaster vulnerability is greatest because the cost and risk of digital conversion must be undertaken before the returns can be realized. Stripping stations of must carry now would cause, not minimize, disruption and cost to subscribers. Cable operators and

[17] International Channel, *Homepage*, *supra* note 11.

programmers also benefit from minimizing viewer confusion during the transition to DTV, which must carry for DTV signals promotes. Nothing would inhibit investment and innovation in DTV technology and services more than uncertainty about carriage of the enhanced signals. Finally, the Commission must recognize that market forces cannot be deferred to completely when the concerns underlying must carry continue to apply to the DTV conversion.

III. CONCLUSION

10. For all of the foregoing reasons, the Commission should not be misled by the Comments replied to here. Instead, the Commission should view the KTSF example as a case study of the public need and benefits of ensuring, through application of must carry to the DTV broadcasts of local stations during and after the transition, that the policy goals are promoted at this pivotal, transitional time.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Helene M. McGrath, a legal secretary with the law firm of Verner, Liipfert, Bernhard, McPherson and Hand, hereby certify that on this 22nd day of December, 1998, I sent a copy of the foregoing "Reply Comments of Lincoln Broadcasting Company" in CS Docket No. 98-120, via first class United States Mail, postage prepaid, to the following:

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